IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.171 OF 2004

Harinarayan G.Bajaj. ... Petitioner.

vs

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Indcap Securities & Anr. ...Respondents

Mr.Z.Andhyorujina with Ranjit Waghela i/b. Dhru & Co, for Petitioner.

Mr.A.S.Rameson, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 28th June,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the Arbitral Tribunal of the National Stock Exchange dated 31st October,2003. By that Award, the Arbitral Tribunal has directed the petitioner to pay certain amount to the respondents. The facts that are material and relevant are that the petitioner is a client, and the respondent no.1 is a sub-broker and the respondent no.2 is a main broker. According to the statement of claim, the respondent

no.1 on behalf of the petitioner had purchased 10,000 shares of Amara Raja Batteries Ltd. on 7th March,2001 and 5,000 shares of the same Company on 8th March,2001. The date 19th March,2001 was the pay-in date. On that date, the petitioner did not pay the price and therefore, the claim was made. The claim was for the price of 15,000 shares of Amara Raja Batteries Ltd. After adjusting the margin money that petitioner had in deposit with the respondents, the claim was of Rs.41,94,754.37 (Rupees Forty one lakhs Ninety Four thousand Seven hundred Fifty Four and Thirty seven paise only) with interest. During the pendency of the arbitral proceedings an application for amendment in the claim statement was made. In the amendment application, it was stated that the respondent no.2 who is a main broker has sold 15000 shares in the month of October,2001 for the consideration of Rs. 8,97,083.13 (Rupees Eight lakhs Ninety Seven thousand Eighty three and thirteen paise only). It was further stated that further 2000 shares of same Company purchased on behalf of the petitioner were sold for Rs.1,55,098.09 (Rupees One lakh Fifty Five thousand Ninety Eight & nine paise only). According to the respondent no.1 this development of sale necessitated amendment in the statement of claim. By that amendment even the prayer in the statement of claim was amended and now instead of price of the shares which were claimed in the original claim statement, the amount of Rs.30,83,235.56 (Rupees Thirty lakhs Eighty Three thousand Two hundred Thirty five and Fifty six paise only) was claimed as a difference between the purchase price and sale price of the shares. This amendment was opposed by the petitioner. According to the petitioner, by the

amendment the respondent no.1 has made a new claim. The original claim was for the price of the shares and the new claim was for damages, and therefore, according to the petitioner, in terms of provisions of Chapter 11 Bye-laws no.3 of the Bye laws of the National Stock Exchange the amendment in the original claim statement or new claim for damages could have been instituted within a period of six months from the date of sale in October,2001. The amendment application was however, allowed by the arbitral tribunal, holding that by the amendment application, the respondent no.1 is not making a new claim but he is merely reducing his original claim. The petitioner has filed reply to the amended statement of claim also. The petitioner reiterated that the claim now made is barred by limitation. It was also contended that the new claim was based on the alleged sale conducted unilaterally in the month of October,2001 and therefore, unless the validity and propriety of that sale is established, the claim made on the basis of that sale should not be accepted. The reference was decided by the Arbitral Tribunal by the Award which is impugned in the petition. The Arbitral Tribunal has observed that by the amendment a new claim was not being made, but what was being done was that the original claim was reduced. The arbitral Tribunal has however held that the sale which was conducted unilaterally was not proper. However, surprisingly inspite of this finding on the sale conducted unilaterally in the month of October,2001, the Arbitral Tribunal proceeded to make the Award in favour of Respondent no.1 on the basis of said sale.

2. The learned Counsel for petitioner submits that the original claim was for the price of the shares which would oblige the respondents to deliver the shares on the petitioner paying the price. The new claim which was introduced by the amendment was not for the price of the shares but for the damages being difference between the purchase price of the shares and the price on which the shares were sold in October,2001. Therefore, it was entirely a new claim that was being made by the respondent no.1. The learned Counsel submits that even the learned Arbitral Tribunal has observed that because of the sale of shares, the claim made originally by respondent no.1 was altered, and therefore, the amendment in the original claim statement was a fresh claim which could have been instituted within a period of six months from the date of sale when the cause of the action for claiming damages arose. The amendment application was made admittedly in December,2002 and therefore, the claim was clearly barred by Law of Limitation. The learned Counsel further submits that even a claim for damages could not have been allowed without the respondent first proving that the sale was validly conducted and that the shares were sold at the market price available on the date of sale. The learned Counsel submits that although the Arbitral Tribunal has observed that the sale was conducted in the month of October,2001, the exact date on which the sale was conducted, is not disclosed. The learned Counsel submits that on the face of the findings of the Arbitral Tribunal that the sale of shares conducted in October,2001, is improper, damages could not have been awarded on the basis of same sale.

3. The learned Counsel for respondents on the other hand submits that because the petitioner did not pay the price of the shares, the claim for the price of the shares was made. The shares were required to be sold because the petitioner was not paying the price of the shares, and therefore, the amount that was recovered as a result of the sale was being taken into consideration while making the claim. Therefore, in fact what was being done by the petitioner by the amendment was that merely the claim was reduced and therefore, there is no question of claim being barred by law of limitation. It is further submitted that the arbitral tribunal has rightly awarded the claim after giving credit for the sale proceeds of the shares.

4. Now perusal of the record shows that initially the claim was made by the respondent no.1 for the price of the shares which the Respondent no.1 had purchased for the petitioner, therefore, the claim was not for damages and on the petitioner paying the price, the petitioner would have been entitled to delivery of the shares. Really speaking as the claim was made for the price of the shares and it being movable property i.e. the shares would stand transferred to the petitioner and the respondents would be merely holding that property till the price is paid. Therefore, it is essential part of the claim that on receiving the price, the property i.e. shares should be delivered and should not be disposed of. The moment that property is disposed of, the respondent no.1 becomes dis-entitle to claim the price of the shares, because the property, the

price of which has become recoverable, ceases to be in the custody of respondent no.1. It is therefore, clear that the claim that was made after the sale was conducted, was the claim for damages. Though in allowing the amendment, the Arbitral tribunal has held that the claim has not been changed but merely the claim has been reduced by the amendment application, the same Arbitral tribunal has held that the result of sale has the effect of altering the original claim. The relevant observations are to be found in paragraph 9.3 of the Award, wherein the Arbitral tribunal has held that :-

> "We consider that it was necessary on the part of the applicant no.1 to seek leave of this Panel and also give notice to the other party, if the proposal of Applicant no.1 to sale the shares has to take place, which has the effect of altering the original claim. As already expressed by us in the earlier paragraph no. 7.2 above, the action taken by the Applicants unilaterally, is considered by us, as improper."

The Arbitral tribunal has thus clearly held that the claim made after the sale, alters the original claim. However, while considering the application for amendment, the same Arbitral tribunal has held that the claim is not being altered and it remained the same, what is being done is that merely the original claim is reduced. It is clear that by the amendment what was being done by the respondents was that the respondents were claiming damages from the petitioner, and therefore, there was an obligation to make claim within a period

of six months in terms of bye-laws of the National Stock Exchange. Even if it is assumed that the amendment was not barred by the law of limitation and the claim could be made, in my opinion, on the basis of material that is available on record, the claim of damages could not have been awarded, as the new claim for damages was based on the validity of the sale unilaterally conducted in the month of October,2001. In paragraph 7.2 (c) the arbitral tribunal has observed thus, in relation to the same:-

> "7.2(c) One of the other points pleaded by the Respondent was the action of Applicant no.1 to arbitrarily taken action to sell the shares after a period of nearly 7 months, without giving notice to the Respondent and without even taking leave of the Panel who were seized of the matter. The Panel of Arbitrators are inclined to find some merit in the Respondent's pleadings. When once an arbitration reference is made and a Panel is constituted for that purpose, the claimant is not expected to take unilateral action which would change the claim made, when the same is placed before the Panel. The arbitration proceedings are quasi-judicial and as such, the matter is like sub-judice. Proper course would have been to take leave of the Panel for whatever action Applicant no.1 proposed to do if it involves any changes. Applicant no.1 has not adhered to this procedure. We have to express our

> disapproval of the unilateral action on the part of Applicant No.1 and have to state that it was not proper. We will take suitable inference on this conduct of Applicant No.1, while deciding the matter on merits."

The aforesaid finding of the Arbitral Tribunal shows that the Arbitral Tribunal has clearly held that the sale unilaterally held was not proper and the Arbitral Tribunal has expressed its dis-approval for having conducted such sale. It is an admitted position that the respondent no.1 has not led any evidence to show that the sale was valid and proper and therefore, in the absence of any evidence on record and on the face of the findings recorded by the Arbitral Tribunal, the claim for damages on the basis of the sale could not have been, in my opinion, allowed by the Arbitral Tribunal. Thus, taking overall view of the matter therefore, the award made by the Arbitral Tribunal cannot be sustained and it is liable to be set aside. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondents are directed to pay cost of this petition to the petitioner as incurred by the petitioner.

In view of the view that has been taken by me in the petition, it is not necessary to deal with the other contentions raised on behalf of the petitioner.